No. PD-1212-17

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

Trial Court No. 2007-1625-C2
Court of Appeals No. 10-15-00032-CR

* * * *

DAMON LAVELLE ASBERRY
Appellant

v.

THE STATE OF TEXAS,
Appellee

* * * *

Appealed from the Court of Appeals for the Tenth Judicial District of Texas
Sitting at Waco

* * * *

APPELLANT'S BRIEF

May 29, 2018

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TRIAL JUDGE

The Honorable Matt Johnson
54h District Court
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TABLE OF CONTENTS

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LIST OF AUTHORITIES

STATE CASES

STATUTES AND RULES

ISSUE PRESENTED

Did the Court of Appeals err in failing to consider the conflict between the new test results and the results presented at trial, as well as the defensive evidence presented by appellant, when deciding whether the new test results cast doubt on the validity of the conviction

STATEMENT OF THE CASE

Appellant was charged by indictment with the felony offense of Murder. He entered a plea of not guilty and a jury trial commenced on June 10, 2008, in the 54th District Court of McLennan, Texas, the Honorable Matt Johnson, presiding. The jury returned a verdict of guilty on June 13, 2008. Punishment was subsequently assessed at Life in the Texas Department of Criminal Justice, Institutional Division. No fine was assessed.

Appellant took his appeal to the Tenth Court of Appeals, which affirmed his conviction and sentence in an opinion delivered on November 4, 2009. *Asberry v. State*, No. 10-08-00237-CR (Tex. App. - Waco, Nov. 4, 2009), *aff'd* No. PD-0257-10 (Tex. Crim. App. 2011)

Following the affirmance of his conviction, appellant filed a Motion for Forensic DNA Testing. (Chapter 64 C.R. 4-23) The motion was denied by a written order from the trial court, which was issued on January 15, 2015

(Chapter 64 C.R. 40-43) Appellant then filed Notice of Appeal (Chapter 64 C.R.41), and took his appeal to the Court of Appeals for the Tenth Judicial District, sitting at Waco, Texas. In a memorandum opinion, dated October 8, 2015, the court affirmed the judgement and order of the trial court. Appellant filed a Petition for Discretionary Review, which was granted on December 11, 2015. On December 7, 2016, the Court of Criminal Appeals issued an opinion remanding the case to the Court of Appeals for reconsideration. *Asberry v. State*, No. PD-1409-15 (Tex. Crim. App., 12/7/2016). On remand, the Court again issued an opinion denying relief, dated, October 18, 2017. Appellant again filed a petition for discretionary review, which was granted on March 28, 2018.

STATEMENT OF FACTS

Both Appellant and the victim, Bryan Daugherty, were students at Texas State Technical Institute in Waco, Texas. Daugherty stumbled to the apartment of a friend in the early morning hours of May 22, 2003, covered in blood. He was taken to the hospital, and died a short time later. The subsequent investigation revealed that Daugherty had been with Appellant earlier in the evening, and they had been seen together several times during the week leading up to the murder. Investigators believed the vehicle Appellant was in on the night of the murder belonged to his brother. The vehicle was located, and examined for evidence. Several items were recovered from the vehicle, and several samples taken.

DNA testing was done on some of those items, including a shirt found in the vehicle, and samples from the seat cushions. That testing did not link Appellant to the offense, but it also did not exclude him. The case was eventually referred to the Texas Rangers as a cold case, and the investigation re-opened in 2007. During that investigation, two inmates at the McLennan County jail came forward and claimed Appellant admitted to the murder. DNA testing was done again, and this time it returned a weak "match" to Appellant.

After his conviction was affirmed, Appellant filed a request for DNA testing. Counsel was subsequently appointed, and a Motion for DNA testing was filed on July 12, 2013. The trial court granted the Motion for DNA testing on September 25, 2013. Initially, there was some confusion over what evidence was available, but the evidence was eventually tested, and the results delivered to the court. After reviewing the results, which contradicted the results presented at trial, the court entered Findings of Facts and Conclusions of Law, and determined that the results of the new testing would not have changed the outcome of the trial. This appeal followed.

SUMMARY OF THE ARGUMENT

The State presented evidence at Appellant regarding a blood stain that was found on the back seat of a car he had been driving. The testimony presented at trial was that neither the victim or Appellant could be excluded as a contributor

to the Stain. Appellant subsequently obtained an Order for DNA testing, and the new results contradicted the results presented at trial; both Appellant and the victim would now be excluded as contributors.

After the new results were in, the trial court held a hearing, and found there was not a reasonable probability that he would have been found not guilty if the new results had been presented at trial. The court relied on evidence that had been challenged by Applicant at trial, including admissions to jailhouse informants. The court failed to consider the fact that the new results contradicted the results produced at trial, and also failed to consider the weaknesses identified by Appellant at trial. In doing so, the trial court failed to utilize the proper standard of review. Had the Court considered those factors, it would have reached a different result.

ARGUMENT AND AUTHORITIES

The Court of Appeals erred in failing to consider the conflict between the new test results and the results presented at trial, as well as the defensive evidence presented by appellant, when deciding whether the new test results cast doubt on the validity of the conviction.

The relevant facts in this case are not in dispute. A blood stain was found on the back seat of the car the State claimed the victim and Appellant had been

in. (7 R.R. 18-23) That blood stain was subjected to DNA testing, and the result was that both Applicant and the victim could not be excluded as contributors. (7 R.R. 81-83) Seven years later the stain was re-tested, and this time both Appellant and the victim were excluded as contributors. The trial court then held a hearing under Art. 64.04, TEX. CODE CRIM. PROC., to enter findings regarding the test results. The contested issue was whether Appellant established "by a preponderance of the evidence" that he would not have been convicted with the new results, and the Court entered findings that were not favorable to Appellant.

Appellant and the victim, Brian Daugherty, were both students at Texas State Technical Institute in Waco. According to several witnesses, Appellant and Daugherty were together the evening before he was murdered. Elgin Asberry testified that Appellant came to pick him up from work in Groesbeck, Texas, and Daugherty was with him. (6 R.R. 161) They were in Elgin's white Mazda. (6 R.R. 162) Elgin took over driving, and dropped them off at his mother's house. Elgin also had another car, a blue Mazda. According to Elgin, Appellant took that car and left with Daugherty, and brought it back several days later. (6 R.R. 163)

After Appellant became a suspect the police located Elgin, and obtained consent to examine the blue Maza. A blood stain was found on a seat cushion and a swab of the state was submitted in 2003 to the Southwest Institute of

Forensic Sciences. ("SWIFS") (6 R.R. 110) The initial analyst who tested the evidence was Stacy McDonald. She testified at trial that presumptive tests for blood were positive on the car seat, cushion, seat belt and a shirt. (7 R.R. 60, 69)

The initial testing was done in July 2003. (7 R.R. 69) There was a second round of testing in October 2003, which was performed by Timothy Sliter, who was also with SWIFS. (7 R.R. 70) The second round of testing produced a partial profile; McDonald testified about those results, and stated that 5 of the 8 markers found matched the victim, as well as Appellant and an unknown male. As a result, Appellant could not be excluded as a contributor to the sample from the seat cushion. (7 R.R. 83) She also testified that appellant could not be excluded as a contributor to a sample from a shirt that was in the back of the car. (7 R.R. 83-84)

The evidence was tested again in 2006, this time by the Texas Department of Public Safety Crime lab ("TDPS").[1] The car was still in storage, and swabs were taken from the seat cushions. Leslie Johnson, did the testing at TDPS and testified at trial that DNA was recovered from the seat cushion, but it did not produce a profile. (7 R.R. 18-28) That testing was done in May 2006. *Id.*

In July of 2013, Appellant filed a Motion for Forensic DNA testing pursuant to Chapter 64 of Texas Code of Criminal Procedure. (Chapter 64 C.R. 4-

[1] No arrests had been made at this point in the investigation. This testing was done after the case was re-opened.

23)[2] Appellant sought an order to test the evidence that had previously been tested, which was granted. (Chapter 64 C.R. 26) Initially, there was confusion over what had been tested, with the Department of Public Safety submitting a letter to the court indicating the evidence had already been tested using the same test that would be used if the evidence was re- tested. (Ch. 64 C.R. 28-29) However, it was subsequently determined that different items were tested; SWIFS tested cuttings that were taken from the seat cushions, whereas TDPS had tested swabs from the cushions. (Ch. 64 2 R.R. 12-13).[2]

When the cuttings were re-tested, no results were obtained for one of the cuttings from the seat cushion or the two swabs from the shirt. However, results were obtained for the other cutting from the seat cushion, which was the same item that had produced the result testified to at trial. Whereas the initial testing could not exclude either appellant or the victim, the new test excluded both. (Ch. 64 2 R.R. 15-16) Specifically, TDPS was able to obtain a mixture that was consistent with at least three contributors, with both appellant and the victim being excluded. According to Erin Casmus, the analyst from TDPS, she was able to obtain a "fuller profile", using a newer technique for extraction. (Ch. 64 2 R.R. 17)

After the results came back, the trial Court held a hearing. The trial court

[2] At the time these swabs were done, the car had been sitting in storage for three years.

subsequently entered Findings of Fact and Conclusions of Law. The Court found that "The State's evidence aside from the DNA evidence presented at trial was strong," and that the testimony of two jailhouse witnesses that was presented at trial was credible. The court concluded by finding:

> that had the results been known at the time of trial, there is NOT a reasonable probability of innocence, and that it is NOT more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence (CR 41)

Law and Standard of Review

Post-conviction DNA testing is governed by Chapter 64 of the Texas Code of Criminal Procedure. Art. 64.03 establishes the requirements for ordering the testing of evidence, and requires the Court to order testing when a defendant establishes by a "preponderance of the evidence ...that the person would not have been convicted if exculpatory results had been obtained through DNA testing."

Once testing is Ordered and the results are in, the trial court must make an additional finding. The court must hold a hearing and "make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." The determination of whether the defendant has shown a reasonable probability that the verdict would have been different had the evidence been available at trial is

reviewed *de novo*. *Routier v. State*, 273 S.W.3d 241 (Tex. Crim. App. 2008)

The proper inquiry is not whether appellant is actually innocent. Instead, the issue is whether the new results "cast doubt" upon the validity of the conviction. *Glover v. State*, 445 S.W.3d 858 (Tex. App. - Houston [1st Dist.], 2014) Stated another way, the issue is whether the new results "create a probability of innocence sufficient to undermine confidence in the outcome of the trial. *Fuentes v. State*, 128 S.W.3d 786 (Tex. App. - Amarillo, 2004).

While the Court of Appeals recited the correct standard, Appellant suggests the Court failed to properly apply it. Specifically, Appellant suggests the Court of Appeals failed to 1) consider the fact that the new results contradicted the results presented at trial; 2) failed to consider the defensive evidence presented at trial; and 3) failed to consider the prior arguments made by the State concerning the importance of the DNA evidence.

Failure to consider fact that new results conflict with results presented at trial

The most glaring failure is the failure to recognize the significance of the fact that the current results contradict the results presented at trial. *Glover, supra.* The Court downplayed the significance of the new results by focusing on the low probabilities, and characterizing the prior results as not conclusively proving that either the victim or appellant was the source of the DNA. (opinion,

pg. 6) While it may be true that the prior results were not conclusive, there is a significant distinction between conclusively proving the sample did not come from either the Appellant or the victim, and simply suggesting that they may not have come from Appellant or the victim. Even though the odds were low, the prior results could still be used to place the bleeding victim in appellant's car, and the new results could not.[3] Even if the odds were low, the prior results could be interpreted as supporting the State's theory. With the new results, the State would not have any physical evidence which placed the victim in the car after he had been stabbed. Appellant suggests that is significant, since it is the only piece of physical evidence that tied appellant to the offense.

In *Glover*, the new test results did not contradict the results presented at trial. A towel had been found, which contained blood stains. Test results established there were two contributors, one of whom was the victim. The minor contributor could not be identified. When the evidence was re-tested, the same result was reached for the major contributor, which was the victim. They also excluded Glover as a minor contributor. He attempted to argue that the new results were favorable, since the jury could have inferred he was the minor contributor because he had not been formally excluded. The Court noted that in

[3] The Court of Appeals also failed to recognize this was a blood stain, which would place the victim in the car after he had been stabbed.

some cases excluding a defendant is exculpatory, but this was not such a case. In contrast, in this case both Appellant and Daugherty were identified as contributors, and it has been established that is not accurate. As previously noted, that was significant because it did not simply place Daugherty in the car; it placed him in the car when he was bleeding.

Failure to consider defensive evidence presented at trial

Appellant also suggests the Court of Appeals focused solely on the evidence which supported a finding of guilt, and ignored the evidence presented by Appellant. That evidence included:

- Evidence that another person - Brandon Trotter - admitted to committing the offense
- Alibi evidence, establishing that Appellant was home when he would have been out committing the offense
- Evidence that jailhouse informants were not in a position to have discussions with Appellant, and that one was a member of the Aryan Brotherhood, which is a group Appellant would not have any contact with.

The evidence the Court recited in its findings follows the arguments made by the State, and did not address the alibi evidence or Trotter's admission. While

the facts cited by the court may be consistent with guilt, they are far from overwhelming. As previously noted, the inquiry is not whether Appellant could still be convicted, but whether there is at least a 51% chance he would be found not guilty. Put another way, is there a better than 50-50 chance that without physical evidence placing the victim in the car, would the State still be able to meet their burden of proving guilt beyond a reasonable doubt. In *Glover*, the Court focused on whether the new results would have "changed the claimed weaknesses, or made them more relevant." Appellant suggests the answer here must be yes; the attacks on the jailhouse informants, along with the confession of another person and appellant's alibi, would be more relevant without evidence that placed the victim in Appellant's car, even if the odds weren't high.

Appellant suggests that when a Court relies on evidence of guilt to negate the exculpatory impact of DNA results, the evidence must be compelling. In *Dunning v. State*, ____ S.W.3d ____, 2018 WL 1095749 (Tex. App. – Ft. Worth, 3/1/18), the Court noted that eyewitness identifications are not always sufficient to overcome exculpatory DNA results. The Court must consider not only the identification, but also the circumstances surrounding it, possible motives and the ability of the witness to make an accurate identification. There is even more reason to question jailhouse informants. They generally have a motive to help the

State, and are not the most trusted members of society.[4] In this case, there was also reason to question their ability to even be in a position to have a conversation with Appellant.

Appellant did not simply attack evidence presented by the State, he also presented evidence that pointed to another person. While the State was not willing to accept Appellant's alibi, it readily accepted the alibi provided by Trotter's mother, without any support. They also willingly accepted Appellant's alleged admission, were quick to dismiss the admission made by Trotter. The were factors the Court of Appeals should have considered when reviewing the strength of the State's case against Appellant. Without evidence placing Daugherty in the car after being injured, Appellant suggests the State's evidence may have been construed in a different light, and the Court of Appeals erred in failing to consider that scenario.

Failure to consider prior arguments made by the State

While not controlling, Appellant suggests the Court of Appeals also erred in not at least considering the position taken by the State concerning the strength of the case. After the defense rested, the State sought to introduce extraneous offenses; specifically, they wanted to introduce testimony concerning appellant

[4] It is worth noting that there is a special rule for jailhouse informants, and their testimony must be corroborated before it's admissible.

providing young men with alcohol or drugs and taking advantage of them (which is evidence the Court now relies on to support the trial court's finding on the DNA motion). In arguing why such evidence was admissible, the State said the following:

> Every single witness who testified for the State was impeached in the same way, whether it was the Lacy-Lakeview Police department having tunnel vision and not looking outside of who the suspect was, close to the time of the crime...
>
> Also, of course, the only direct evidence witnesses the State has are convicted felons who were in a cell with the defendant. And there was a lot of testimony yesterday by the defense witnesses that there was no privacy in those cells, how they're laid out and all that stuff before the jury and there's some question as to whether the jury would believe that they had the opportunity to even have the conversation, much less, you know, the content of what they said. (9 R.R. 8)
>
> And third, of course, is the issue of alibi. That puts his identity now even more at issue than it was when we've got DNA, that, you know corresponds to half of the population and we have nobody but felons to say he's the one who said he did it. (9 R.R. 9)

Appellant does not suggest the State is not always bound by arguments made during trial, but does suggests it is something the Court should take into consideration. At a minimum, it establishes the evidence against appellant was not as strong as the Court now appears to claim.

Conclusion

As already noted appellant does not have to establish beyond a reasonable

doubt that he would not have been convicted with the new results. Instead, he must only do so by a "preponderance of the evidence". Appellant suggests the Court of Appeals effectively required him to prove his innocence. When the evidence is reviewed under the proper standard, the only conclusion is that there is a reasonable probability Appellant would not have been convicted if the new results had been available at trial.

PRAYER

WHEREFORE, APPELLANT PRAYS the court grant this petition, reverse the decision of the Court of Appeals and remand the case for further consideration.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for discretionary review has been delivered to Abel Reyna, District Attorney for McLennan County, Texas, and to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, on this the 29th day of May 29, 2018.

/s/ Walter M. Reaves, Jr.
Walter M. Reaves Jr.

THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

DAMON LAVELLE ASBERRY Appellant	*	
vs.	*	PD No.
	*	COA #10-15-00032-CR
THE STATE OF TEXAS Appellee	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), I hereby certify that the Appellant's brief filed in this cause contains 3,916 words. The document was prepared using Word 2016, and the word count was generated using that program.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing certificate was mailed to the Office of the District Attorney for McLennan County, Texas, on May 29, 2018

/s/ Walter M. Reaves, Jr. Walter M. Reaves, Jr.

17